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Family

Decision recognizes customary care agreements are 'part of Indigenous self-governance': counsel

By **Amanda Jerome**

(April 7, 2022, 10:36 AM EDT) -- The Ontario Court of Appeal has determined that the caregivers of an Indigenous child can make an application under the *Children's Law Reform Act* (CLRA) for parenting orders in a decision, that counsel for an intervener said, recognizes "customary care agreements form an important part of Indigenous self-governance."

Asha James, a partner at Falconers LLP and counsel for the intervener, Nishnawbe Aski Nation, with Amanda Micallef, said the decision is important because it also recognizes customary care agreements are part of a Nation's "inherent right to protect their children and to have jurisdiction over them and to care for them in a way that's consistent with their culture and their traditions."

Another important aspect of the decision, James pointed out is "an understanding that these customary care agreements are based on the customs and tradition of the First Nation, so they're not all going to be the same and be able to check the boxes that the Ministry has set out in terms of what would be a best ideal."

Asha James, Falconers LLP

"I think that lawyers and the courts need to recognize that the form of these agreements and how they're entered into, and their purpose is really set by the First Nation based on their inherent jurisdiction," she added.

"We don't want to be taking a pan-Indigenous approach to say, 'this should work for all First Nations.' We've tried that in this country, and we do not have a good history. We need to recognize an individuality and a uniqueness of each Nation and each territory and how they chose to care and protect for their kids," she stressed.

In *M.L. v. B.T.*, 2022 ONCA 240 the court considered whether the appellants, M.L. and D.L., were "entitled" to bring an application under the CLRA for parenting orders for J.T., a "six-year-old

Indigenous child and a member of the Berens River First Nation in Manitoba" who had been in their care since she was 8 days old.

According to court documents, J.T.'s "biological mother, D.C., is a member of the Berens River First Nation of Manitoba but resides in Thunder Bay." J.T.'s biological father, B.T., also lives in Thunder Bay but is not Indigenous.

"D.C. wants J.T. to live with her maternal great aunt, R.C., who lives in the Berens River First Nation. R.C. also cared for another of J.T.'s sisters," the court explained.

The court noted that J.T. "has a loving relationship" with the appellants and that they are "the only caregivers she has ever known."

"She considers them to be her parents," the court explained, also noting that "D.L. is a status member of the Couchiching First Nation, which, he says, is an Ojibway community like Berens River First Nation" and "M.L. is not Indigenous."

According to court documents, "J.T. was born in Thunder Bay" and the hospital made a referral to Dilico Anishinabek Family Care (Dilico), "which apprehended J.T., executed a Temporary Care Agreement with her biological parents" and placed her in the care of the appellants.

"At the outset, the appellants cared for J.T. as 'foster parents' pursuant to a Temporary Care Agreement executed between the biological parents and Dilico. However, this agreement expired on February 20, 2016," the court noted, adding that there was "considerable uncertainty surrounding" the care agreements signed after the agreement expired.

The appellants launched an application in June 2017 under the CLRA for "a parenting order for J.T., with reasonable parenting time on reasonable notice" for her biological parents. However, Dilico brought a protection application under the *Child, Youth and Family Services Act* (CYFSA), which "had the effect of automatically staying the appellants' CLRA application pursuant to s. 103 of the CYFSA."

In 2018, "for the first time," the court noted, Dilico and Berens River First Nation "executed an agreement with D.C. only." Neither J.T.'s biological father or the appellants were signatories to that agreement.

"The agreement does not identify a customary caregiver," so J.T. "remained in the care of the appellants," the court record shows.

The appellants continued with an application for a parenting order under the CLRA, but Dilico "brought a motion to strike their application, arguing that the appellants were 'foster parents' and, as such, were precluded from party status on any parenting application for J.T."

While awaiting their CLRA application to be determined, the appellants "brought an emergency motion to prevent Dilico from sending J.T. to Manitoba" in 2019. The motion was granted and J.T. continued to live with the appellants "on a temporary basis."

The motion judge, Justice Danalyn MacKinnon of the Ontario Court of Justice, "dismissed Dilico's motion to strike the appellants' CLRA application," rejecting its claim to legal guardianship of the child.

Justice MacKinnon also "rejected Dilico's argument that the appellants' application under the CLRA could not proceed because of the existing care agreement, finding that the agreement constituted an 'out-of-court' agreement that did not have a nexus with the CYFSA." She determined that the appellants were "customary caregivers, not foster parents, and were therefore not covered by r. 7" of the *Family Law Rules* (FLRs).

The motion judge "ordered that the appellants' parenting order application under the CLRA could proceed," the court explained.

Dilico appealed and Justice W. Danial Newton, of the Superior Court of Justice, determined that Justice MacKinnon "erred in law in concluding that 'out-of-court' care agreements did not fall under

the scope of the CYFSA."

Justice Newton allowed Dilico's appeal and "concluded that customary care agreements were an important and preferred component of the CYFSA, and the absence of the biological father's signature did not invalidate the customary care agreements in this case." The appeal judge "struck the appellants' CLRA application and prohibited them from being parties in a case involving decision-making responsibility or parenting time in respect of J.T."

The appellants brought their case to the Ontario Court of Appeal, raising two issues: did Justice Newton "err in concluding that the care agreements provide Dilico and Berens First Nation with the authority to make legal decisions as to J.T.'s best interests without review by a court of law?" And did Justice Newton "err in determining that the appellants were 'foster parents' and therefore barred from party status on any application regarding parenting orders for J.T.?"

Justice Grant Huscroft, writing for the Court of Appeal, framed the fundamental question as: "are the appellants entitled to proceed with their CLRA application?"

"If they are, then this matter must be returned to the court of first instance to determine a plan of care that is in J.T.'s best interests," he explained.

Justice Huscroft noted that the CYFSA is engaged in this case and highlighted that s. 1(2) of the Act "includes an additional purpose distinct to First Nations, Inuit and Métis peoples: wherever possible, they should be entitled to provide their own child and family services, and all services to First Nations, Inuit and Métis children and young persons and their families should be provided in a manner that recognizes their cultures, heritages, traditions, connection to their communities, and the concept of the extended family."

"Customary care," he wrote, "plays an important role in meeting this purpose as well as meeting the other purposes of the CYFSA, including its paramount purpose to promote the best interests, protection, and well-being of children."

"As the intervener Association of Native Child and Family Services Agencies points out, customary care is an essential practice for First Nations in partnership with Indigenous child and family services agencies," Justice Huscroft added, stressing that "[A]lthough the tenets of customary care differ from nation to nation, at its core the concept envisages a child's care as a collective responsibility."

The court noted that the "agreement in this case was not a typical customary care agreement" and judicial oversight is required.

"In essence, Dilico seeks to rely on the legislative preference for customary care agreements to urge non-interference by the court, despite having failed to provide care that satisfies the definition of customary care under the CYFSA," Justice Huscroft explained.

The court noted that Dilico contended that, "as a child welfare agency, it had and continues to have legal guardianship of J.T. and that this legal guardianship constitutes a form of customary care." However, Justice Huscroft did not agree with this argument.

"The provision of care and supervision to an Indigenous child by a child welfare agency does not conform to the definition of customary care," he wrote, stressing that "customary care must be provided by a person."

"If a society seeks to rely on a customary care agreement to resolve protection proceedings out of court, the agreement must be carefully prepared and have the consent of all the parties. Otherwise, the child loses the protection of the processes and timelines set out in the CYFSA without assurances of the intended benefits," Justice Huscroft added, noting that in this case "Dilico acted without statutory authority, without the legal parents' consent, and without the timely involvement of Berens River First Nation."

"The agreements it made are not valid customary care agreements and have understandably led to confusion and delay," he explained.

The court then determined that the appellants are entitled to continue with their CLRA application, noting that this action is "not tied to whether they are considered 'foster parents' or 'customary caregivers.' "

"Much has been made of the distinction between 'foster parents' and 'customary caregivers' on this appeal. But in my view, nothing turns on it," Justice Huscroft wrote, noting that the appellants are "necessary parties under either the CYFSA or CLRA regardless of how they are characterized."

The court found that Justice Newton "erred in concluding that r. 7" of the *Family Law Rules* "precluded the appellants, as 'foster parents', from applying for parenting orders for J.T. under the CLRA."

The Court of Appeal stated in *Valoris Pour Enfants et Adultes de Prescott-Russell* that "both r. 7(4) and s. 39(3) of the CFSA preserve the court's discretion to add a foster parent as a party to a child protection proceeding", albeit adding that care must be taken in exercising the discretion to add a foster parent," Justice Huscroft noted.

"In the absence of a valid customary care agreement, nothing in either the CYFSA or the FLRs precludes the appellants from commencing a proceeding under the CLRA to determine what is in a child's best interests," the judge explained, adding that "there is no question that the appellants — the only caregivers J.T. has ever known — have relevant information that would assist the court in determining her best interests."

Justice Huscroft, with Justices Gary Trotter and Steve Coroza in agreement, determined in a decision released March 23 to allow the appeal and "reinstate the order of Justice MacKinnon" pending the CLRA hearing.

Jessica Gagné, family and child protection lawyer

Jessica Gagné, counsel for the appellants, said "it is fundamental to our democracy that state actions are subject to oversight by the judiciary to ensure compliance with laws and in particular, Charter rights."

"In line with that fundamental precept, this decision confirms that when the state intends to move a child after six years spent in one home, the child's de facto parents are entitled to have the matter heard and decided by a judge. The fact that the Children's Aid Society in this case (Dilico Anishinabek Family Care) has argued otherwise for the past four years demonstrates a clear desire to avoid judicial oversight and scrutiny of the decisions they make for children and families, and ought to concern everyone," she told *The Lawyer's Daily*.

"Fortunately, this decision puts a stop to several other highly questionable practices of Dilico Anishinabek Family Care that have developed in recent years. For one, it confirms that both biological parents (regardless of whether one parent is Aboriginal and one is not), as well as the customary caregivers (regardless of whether one is Aboriginal and one is not) must be signatories to any customary care agreements. It also confirms that a customary caregiver must be a 'person' and cannot be Dilico itself," she added.

In Gagné's opinion, however, this decision "does not go far enough towards putting a stop to the concept" of "out of care customary care agreements" for Indigenous children.

"The 'out of court customary care agreement' concept is a fairly recent invention of Aboriginal child welfare services, the primary purpose of which is to circumvent the permanency planning timelines in the CYFSA for Aboriginal children. The child in this case, who is now 6 years old, would have otherwise been entitled to a permanent placement four years ago. Instead, the concept of the 'out of court customary care agreement' — which has no lawful basis in the CYFSA — has kept her in limbo all this time," said Gagné, who noted that J.T. is "by no means the only Aboriginal child in our province who has not received the benefit of the permanency planning protections set out in the CYFSA."

"This practice is widespread. As Justice Mackinnon, the motions judge in this case, put it — it's a clash of philosophies. The CYFSA gives parents a limited window of time to correct their parenting deficiencies, recognizing that children are entitled to permanency and stability. Some Aboriginal bands/child welfare agencies oppose the existence of the statutory timelines, placing less importance on the values of permanency and stability for children in favor of reunification with biological parents," she added.

"As a lawyer, what I care about is that such differential treatment between children on the basis of race be lawful — in other words, it ought to, at minimum, be enacted via democratically passed laws (whether by a First Nations government exercising its inherent jurisdiction or the province). And as of right now, there are no such laws," she stressed.

Gagné is sure that the Court of Appeal's "strong statement" that "consent to out-of-court customary care agreements means that everyone involved has to consent — the CAS, all of the child's biological parents, all of the customary caregivers, and the child's band — is going to make things better."

"However, the child does not have to consent to the out-of-court customary care agreement, and that raises very interesting questions about the fact that these out-of-court customary care agreements are being used to avoid the permanency planning provisions of the CYFSA which are designed to protect the child. This is yet another reason why the differential treatment between children ought to have its basis in written laws," she explained.

A further concern Gagné has is that the Court of Appeal "appears to reason that having recourse to the courts when things go wrong with these out of court customary care agreements is enough, but it is not enough."

"Given that the Charter rights of parents and children are triggered when the state takes the view that children cannot reside with their biological parents, these out-of-court customary care agreements are more akin to plea bargains than they are to commercial contracts. It is one thing to have access to the courts when a commercial contract goes wrong. But for plea bargains in criminal law, the law requires that judges do a 'plea inquiry' to make sure that the accused person understands the nature and consequences of the plea bargain," she explained.

"Likewise, there should be a judicial inquiry into the consents given for customary care agreements, to make sure that the biological parents understand the nature and consequences of what they are signing, because the consequences (the removal of their children from their care) are so serious, and the parents involved are among the most vulnerable members of society. It is not clear how that judicial inquiry can occur when the fundamental purpose of the out-of-court customary care agreement is to avoid judicial scrutiny of child welfare activities pertaining to a child," she added.

Counsel for Dilico and the Native Child and Family Services Agencies of Ontario did not respond to request for comment.

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